**Longwood Security Services, Inc. *and* United Government Security Officers of America International Union and its Local 365, Petitioner.** Case 01–RC–145376

July 19, 2016

## DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 13 and 14, 2015, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 26 for and 30 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that the election must be set aside and a new election held. We agree with the hearing officer's recommendation to sustain the Petitioner's Objection 3 alleging that the Board agent conducting the election improperly refused to allow the Petitioner its designated observer.

On January 30, 2015, the United Government Security Officers of America, Local 365 filed a petition to represent the Employer's special police officers. The parties entered into a Stipulated Election Agreement including the following standard clause: "Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally." The Petitioner initially designated employee Ken O'Boy as its observer, but on the day of the election, O'Boy informed James Natale, the Petitioner's East Coast Regional Director,[3] that he was scheduled to work and was unavailable. Approximately 30 minutes before the 1 p.m. start of the first of two scheduled voting sessions, Natale asked the Board agent conducting the election to allow him to substitute as the Petitioner's observer. The Board agent refused, citing Natale's status as a nonemployee union official. The election proceeded with an observer for the Employer, but none for the Petitioner. Before the second session that evening, Natale again requested to serve as the Petitioner's observer. The Board agent again denied the request.

We agree with the hearing officer that the Board agent's conduct raises a reasonable doubt as to the fairness and validity of the election. In *Browning-Ferris Industries of California*, *Inc.*, 327 NLRB 704, 704 (1999), the Board articulated a procedure for Board agents to follow when they become aware that a party intends to use a potentially objectionable observer. Under this procedure, the Board agent must advise the parties of the potential adverse consequences of using the observer, i.e., that the election might be set aside if an objection is filed and it is later determined that the use of the observer was not reasonable under the circumstances. Id. The Board agent should then allow the election to proceed with the observers chosen by the parties, leaving to the objections process the resolution of any issues that might be raised as to the reasonableness of the use of the questionable observer. Id.

Instead of following the procedure outlined above, the Board agent in this case refused to allow Natale to serve as an observer and caused the election to proceed with an observer present for the Employer and no observer present for the Union. As indicated above, the Stipulated Election Agreement provided for each party to have an equal number of observers present during the election. The Board agent's refusal to seat Natale—while allowing the Employer an observer—was therefore a breach of the Agreement. The Board has long held that the breach of a provision in an election agreement providing for an equal number of observers is a material breach that warrants setting aside the election without the need for a further showing of prejudice. *Browning-Ferris*, 327 NLRB at 704*; Breman Steel Co.*, 115 NLRB 247, 249 (1956).

We disagree with our dissenting colleague's claim that the concerns underlying the Board's decision in *Browning-Ferris* are not present here. In *Browning-Ferris*, as here, the parties entered into a stipulated election agreement providing for an equal number of observers for both parties. On the day before the election, the petitioner informed the Region that it was unable to find any current employees to act as observers. It instead proposed using two former employees of the employer. The Board agent conducting the election refused to allow the proposed observers, in the mistaken belief that the agreement required them to be employees of the employer. The election took place with two observers for the

[1] We deny the Employer's motion to take judicial notice of a board document in this case or in the alternative to supplement the record as moot. The Stipulated Election Agreement that the Employer asks the Board to admit into evidence is already part of the record in this case.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objection 2.

[3] Natale testified that he performed both organizing and business agent work for the Petitioner, but beyond his appearance at the election, the record does not establish the level of his involvement in the Petitioner's organizing campaign.

employer and none for the petitioner. On review, the Board upheld the Regional Director's finding that the numerical imbalance was a material breach of the agreement requiring the election be set aside. The Board weighed the impact of this breach against the potential impact of using nonemployee observers during the election. It found that even if the parties interpreted the agreement to require that observers be employees of the employer, the use of nonemployees would, unlike the disparity in the number of observers, not be a material breach of the agreement or per se objectionable. 327 NLRB at 704.

Contrary to our colleague's position, the fact that Natale was a union official—as well as a nonemployee—does not require a different analysis. The dissent primarily argues that the use of a union official as an observer is always objectionable and should never be permitted. However, the Board, with court approval, has consistently rejected that argument.

"The Board's principal goal in conducting representation elections is to guarantee employees' freedom in exercising their choice with respect to union representation." *First Student, Inc.*, 355 NLRB 410, 410 (2010). To that end, the Board has adopted a per se rule that individuals closely identified with management may not serve as observers, without imposing a parallel prohibition on individuals closely identified with a petitioning union. Id. As the Board explained in *First Student*, "employees [are] aware[] that the employer wields substantial and direct control over their livelihoods and day-to-day working conditions." Id. A petitioning union, however, does not possess the same degree of control over employees' working conditions. Id.[4] Accordingly, the Board has long held, with judicial approval, that absent evidence of misconduct, service by a union official as an observer is not grounds to set aside a representation election.[5] See, e.g., *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) (holding that use of a nonemployee union official as an observer does not warrant setting aside an election unless there is evidence that the official engaged in improper conduct); *New England Lumber Division of Diamond International Corp. v. NLRB,* 646 F.2d at 3 ("The Board has consistently held, with court approval, that the designation of a union official as observer does not warrant overturning an election unless there is evidence that the official engaged in improper conduct while acting in that capacity."); *NLRB v. E-Z Davies Chevrolet*, 395 F.2d 191, 193 (9th Cir. 1968) (holding that "the mere presence of" the union's vice-president, who was not an employee of the employer, at the polls while serving as the union's observer, "did not vitiate the election"); *Shoreline Enterprises of America, Inc. v. NLRB*, 262 F.2d 933, 942 (5th Cir.1959) ("As for 'the (selection of) union officers or leaders' as election observers, this Court has held that it is not 'a ground for invalidating the election'.") (citations omitted); *Shoreline Enterprises of America,* 114 NLRB 716, 718–719 (1955) (holding that the use of a paid union organizer as an election observer is not grounds for invalidating an election).

In view of the very different positions that unions and employers occupy with respect to employees, the Board—with court approval—has consistently applied different standards to a wide variety of employer and union conduct during an election campaign. For example, an employer is generally prohibited from visiting the homes of its employees for the purpose of campaigning against the union. *Peoria Plastic Co*., 117 NLRB 545 (1957). Home visits by union representatives, however, are unobjectionable so long as they are unaccompanied by threats or other coercive conduct. See *Canton, Carp's, Inc.*, 127 NLRB 513, 513 fn. 3 (1960). Likewise, it is well established that an employer may not conduct a preelection poll of its employees on the question of unionization. See *Offner Electronics, Inc.,* 127 NLRB 991, 992 (1960). A union, though, may legitimately measure support among the workers. *Glamorise Foundations, Inc.,* 197 NLRB 729, 729 fn. 4 (1972), citing *J. C. Penney Food Department* (titled "*Springfield Discount*"), 195 NLRB 921, 921 fn. 4 (1972) (overruling *Offner Electric* to the extent it could be read to bar noncoercive polling by a union), enfd. 82 LRRM 2173 (7th Cir. 1972). See also *Springfield Hospital*, 281 NLRB 643, 692–693 (1986), enfd. 899 F.2d 1305 (2d Cir. 1990). The Board's policy of differentiating between union and employer polling was endorsed by the Sixth Circuit in *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362

[4] See also *New England Lumber Division of Diamond International Corp. v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981) ("There are obvious differences . . . between permitting a local union official to be present in the polling place during voting and permitting individuals closely identified with management to be there. The Board could reasonably conclude that the presence of supervisors in the polling place during voting, even in the role of observers, might create an atmosphere of fear or intimidation where the similar presence of a local union official would not.").

[5] We acknowledge that the Board's Casehandling Manual (Part Two), Representation Proceedings, Sec. 11310.2 states in part that "[a] union official should not serve as an observer unless he/she is also an employee of the employer." That section does not state an outright prohibition on the use of nonemployee union officials as observers. Rather, it merely expresses the normative principle—with which we do not necessarily disagree—that their performance of this role is disfavored. We emphasize, moreover, that the Casehandling Manual is not binding upon the Board and that departures from its guidelines are not per se objectionable. See, e.g., *Patient Care,* 360 NLRB No. 76, slip op. at 2 (2014).

(6th Cir. 1984). There, the court rejected the employer's argument that the Board could not differentiate between union and employer polling, stating: "By no stretch of the imagination are employers of unorganized workers and unions seeking to organize those workers equally matched with respect to their powers of or opportunities for the exercise of coercion. . . . This disparity between the disruptive powers of the employer and those of the union convinces us that pre-election polling by the union is not impermissible *per se*." 749 F.2d at 364–365. See also *Maremont Corp. v. NLRB,* 177 F.3d 573, 577 (6th Cir. 1999) (same); *Louis-Allis Co. v. NLRB,* 463 F.2d 512, 517 (7th Cir. 1972) (same).

The dissent contends that the continuing validity of the Board's application of different standards to like kinds of employer and union conduct during representation elections has been called into question by the D.C. Circuit's decision in *Nathan Katz Realty*, *LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). We disagree. In *Nathan Katz*, a Regional Director denied an employer's request to hold a hearing over whether union officials engaged in objectionable conduct when they were stationed in a vehicle inside a no-election zone and were honking and gesturing at employees as they entered the voting site. The Regional Director found that the allegations, even if true, were insufficient to demonstrate that the union had interfered with the employees' free choice. The Board denied a request for review of that decision and later granted the General Counsel's motion for summary judgment when the employer refused to bargain with the union. The D.C. Circuit denied enforcement of the Board's order in the refusal-to-bargain case. The court observed that, "in previous cases, the Board has stated that a party's mere presence may be sufficient to justify setting aside an election," citing *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (holding that employer engaged in objectionable conduct when a supervisor was stationed within 10 to 15 feet of the entrance to the voting area), and *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964) (holding that employer engaged in objectionable conduct when employer's president stood by the door to the election area and employees had to pass within 2 feet to gain access to the polls). 251 F.3d at 992. The court rejected the Board's attempts to distinguish *Electric Hose* and *Performance Measurements* on the basis that the union agents in *Nathan Katz* were not "immediately outside of the actual polling area," but were instead "stationed near the outside entrance to the building." Id. at 992–993. Finding that the Board failed to "offer a reasoned basis for its departure from precedent," the court vacated the Board's decision and remanded the case for further proceedings. Id. at 993. There is no indication, however, that the court was presented with, or considered, an argument that *Electric Hose* and *Performance Measurements* were distinguishable on the basis that those cases involved *employer* agents rather than union agents.[6] The dissent's reliance on *Nathan Katz* for the proposition that the Board should apply a uniform standard prohibiting union agents and employer agents alike from serving as observers in representation elections is therefore misplaced.

Equally unavailing is the dissent's reliance on *Randell Warehouse of Arizona*, *Inc.*, 347 NLRB 591 (2006). In *Randell Warehouse*, the Board overruled precedent establishing different standards for union and employer photographing of employees engaged in Section 7 activity. The Board found that the differences in "the relative capacity [of employers and unions] for reprisal provides no basis for departing from a uniform standard for . . . the photographing of employees engaged in Section 7 activity during an election campaign." Id. at 595. The Board therefore held that "unexplained photographing has a reasonable tendency to interfere with employee free choice . . . regardless of whether the party engaged in such conduct is a union or an employer." Id. at 591. The Board articulated its decision narrowly, however, taking care not to disturb the substantial body of case law, discussed above, establishing different standards for employers and unions with respect to conduct such as conducting home visits, asking employees to sign cards or petitions, or conducting polls.[7] Id. at 595–597. Further, as directly relevant here, the Board neither held nor implied that it was abandoning its long-standing, judicially approved policy of permitting nonemployee union agents to serve as observers in representation elections while prohibiting individuals closely identified with management from acting in that capacity.

[6] Following the remand, the Board directed a hearing on whether the union officials interfered with the election. After conducting the hearing, the administrative law judge found that the union officials did not engage in objectionable electioneering and that the Board did not depart from its own precedent because the rule on being continually present in a place employees had to pass on the way to vote did not apply to union officials.

[7] In *Randell,* the Board distinguished union solicitation and polling from photographing on the basis that "the need to solicit and persuade as part of an organizational campaign is obvious even without an explanation" while, in contrast, "the purpose of photographing employees engaged in Section 7 activities is rarely self-evident . . . . [A]n employee who is the target of unexplained photographing is unlikely to have any idea why his or her photograph is being taken." Id. 595–596. That distinction applies equally here. Even without an explanation, employees would reasonably understand the presence of a union official as an observer during a representation election as serving the legitimate purpose of ensuring that the election was being conducted fairly, challenging voters, and identifying potentially objectionable conduct.

We also find no merit in the argument of the Employer and our dissenting colleague that Natale serving as an observer would have constituted a material breach of the Stipulated Election Agreement. The Employer and our colleague incorrectly assert that the Agreement's provision for "nonsupervisory-employee observers" required observers who were both nonsupervisors and current employees of the Employer. To the contrary, the Board has found that this standard clause is aimed at preventing supervisors of the employer from serving as election observers; it is not intended to preclude nonemployees from serving as observers. *Browning-Ferris*, supra, 327 NLRB at 704, citing *Embassy Suites Hotel*, *Inc.*, 313 NLRB 302, 302 (1993) (explaining that, "the concern is that supervisors (or other persons whose interests are closely aligned with management) may have an intimidating impact on voters."). Natale, of course, was not a supervisor of the employer, and was therefore not ineligible under the Agreement.

While our colleague purports to recognize the importance of election observers, he does not appear to fully appreciate how their absence or an imbalance in their numbers may affect the voting process. Certainly observers perform critical duties by challenging voters and identifying potentially objectionable conduct, as acknowledged by our colleague, but their value goes beyond that. As the Board explained in *Browning-Ferris*:

> By their presence, observers help to assure the parties and the employees that the election is being conducted fairly. When one party has observers and the other does not, or there is an imbalance in the number of observers, there is "a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of [one party] and partiality on the part of the Board."

327 NLRB at 704 (quoting *Frontier Hotel v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980)). These are not trivial considerations. The electorate may reasonably interpret the absence of observers for one party, or an imbalance in the number of observers, as a sign that the Board is partial to the party with the greater number of observers or that the party with the greater number of observers is responsible for running the election. *Sonicraft, Inc.,* 276 NLRB 407, 411 (1985). Such an impression would reasonably tend to interfere with the fairness and validity of the election. *Browning-Ferris*, 327 NLRB at 704*; Breman Steel Co.*, 115 NLRB at 249.

In sum, contrary to the dissent, we decline to deviate from *Browning-Ferris* and the Board's longstanding policy of permitting nonemployee union agents to serve as observers in representation elections. Accordingly, we sustain the Petitioner's Objection 3, set aside the election, and direct a second election.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Government Security Officers of America International Union and its Local 365.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, *Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. July 19, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Pursuant to a Stipulated Election Agreement, the Board conducted an election to determine whether a unit of all full-time and regular part-time special police officers employed by the Employer in its Community Services Division and working within the City of Boston desired to be represented by the Union for purposes of collective bargaining. The tally of ballots shows 26 votes for representation and 30 votes against representation. There were no challenges.

The Union filed objections to the election. In Objection 3, the Union alleged that the Board agent conducting the election improperly refused to allow the Union's East Coast Regional Director, James Natale, to serve as an observer when the Union's designated observer was unable to appear due to a work conflict. The hearing officer recommended sustaining Objection 3. My colleagues agree with the hearing officer, set aside the election, and direct a second election.[1]

Contrary to my colleagues, I believe that the Board agent acted appropriately when she denied the request to permit Natale (the Union's East Coast Regional Director) to serve as an observer. Therefore, I would reject the hearing officer's recommendation to sustain Objection 3. As discussed below, I do not believe that under *Browning-Ferris Industries of Californi*a, 327 NLRB 704 (1999), or the Board's Casehandling Manual (Part Two), Representation Proceedings, Section 11310.1 and 11310.2 (which the hearing officer discussed at some length), the Board agent was *required* to let Natale serve as observer and leave any arguments about his eligibility to so serve for the postelection objections stage of the proceeding. To the contrary, by preventing Natale from serving as an observer based on his status as a high-ranking official of one of the parties, the Board agent furthered the important goal of protecting employees' freedom of choice, while avoiding a substantive problem that could cause the entire election to be set aside. In short, the Board agent did the right thing, based on important substantive considerations: permitting the election to proceed as scheduled, without objectionable conduct associated with having a party's senior official acting as an observer while employees cast their votes.

The relevant facts are as follows. The parties' Stipulated Election Agreement states, in pertinent part, that each party "may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally." In advance of the election, the Union designated employee Ken O'Boy as its observer. The secret-ballot election occurred on March 13 and 14, 2015, with voting sessions from 1 to 3 p.m. and 8 p.m. to 1:30 a.m. Prior to the start of the election on March 13, the Union's East Coast Regional Director, Natale, learned from the employee, O'Boy, that O'Boy would be unable to serve as the Union's observer due to a work conflict.[2] Although Natale was a high-ranking union official who would not normally be permitted to serve as an observer, Natale requested that he be permitted to act as the Union's observer in place of O'Boy. The Board agent denied the request on the grounds that Natale was ineligible to serve because of his nonemployee status and his status as a union official. The Board agent advised Natale that he was not allowed to stay in the election area, and he was ushered out.

Natale returned to the polling place that evening to attend the preelection conference before the second voting session. He again asked the Board agent if he could stay to serve as the Union's election observer. The Board agent denied the request but told Natale that he could return at the conclusion of the election to witness the ballot count. Natale left the polling area and returned at 1:30 a.m. to witness the opening, counting, and tallying of the ballots. Natale testified that he likely would not have challenged any voter.

In its Objection 3, the Union alleged, in relevant part, that the Board agent improperly denied Natale entrance to the polling place to serve as an observer and improperly determined his eligibility to serve as an observer. The Union cited the Casehandling Manual in support of its argument that the election should be set aside as a result of the Board agent's action. The hearing officer recommended sustaining Objection 3, relying in part on

[1] There are no exceptions to the hearing officer's recommendation to overrule the Union's Objection 2. Objections 2 and 3 were the only objections sent to hearing.

[2] Natale was the only witness to testify at the hearing, and the hearing officer generally credited his testimony. As the Union's East Coast Regional Director, Natale acts as director of organizing, among other things. He testified that his duties relate to "everything" from "Maine to Pennsylvania."

*Browning-Ferris Industries of California*, supra. In its exceptions, the Employer contends, among other things, that *Browning-Ferris Industries* is materially distinguishable from the present case and that Natale's mere presence as an observer would have led employees to question the impartiality of the election.

My colleagues adopt the hearing officer's recommendation to sustain Objection 3. They agree that, under *Browning-Ferris Industries*, the Board agent should not have excluded Natale from serving as the Union's observer. My colleagues find that the Board agent should have allowed Natale to serve as an observer and left any arguments about his eligibility to be raised in postelection objections. My colleagues reason that, by determining Natale's ineligibility before the fact and refusing his request, the Board agent created imbalance in the number of observers (the Employer had an observer, the Union did not), and they find this constituted a material breach of the Stipulated Election Agreement that warrants setting aside the election. My colleagues also rely on precedent holding that it is not per se objectionable for a union official to serve as an election observer. Finally, they defend treating employer agents and union agents disparately—prohibiting the former, but not the latter, from serving as election observers—on the basis that employers wield power over employees and unions do not.

I respectfully disagree with my colleagues' decision to sustain Objection 3. In my view, my colleagues and the hearing officer have reached the wrong conclusion for the wrong reasons by dealing with relevant issues in the wrong order.

The starting point here should be the importance of having Board elections conducted in a timely manner that also gives effect to employee free choice. This is set forth in our statute, which states that the Board "in each case" should "assure to employees the fullest freedom in exercising the rights guaranteed by this Act."[3] Both parties had ample notice when the election was going to be conducted: the Stipulated Election Agreement (Stipulation) was approved on February 13, 2015, providing for the election that took place as scheduled on March 13 and 14, 2015. And the Stipulation was equally clear regarding who could be an observer. It stated: "Each party may station an equal number of authorized, *nonsupervisory-employee* observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally."[4] Additionally, the Board's Casehandling Manual states in relevant part:

> Observers should be *employees of the employer*, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances. . . . A supervisor should not serve as an observer. . . . An alleged discriminatee is eligible to serve as an observer. *A union official should not serve as an observer unless he/she is also an employee of the employer.*[5]

It is also well established that the Board's representation elections "'are not lightly set aside.'" *Safeway, Inc.*, 338 NLRB 525, 525 (2002) (quoting *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991), and citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)).

Moreover, the mere presence of a party's agents in a place employees must pass in order to vote constitutes objectionable conduct sufficient to set aside an election. See *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (presence of two supervisors in areas employees had to pass in order to vote objectionable); *Performance Measurements Co., Inc.*, 148 NLRB 1657 (1964) (presence of employer's president near door to the election area objectionable); see also *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), where the court faulted the Board for its unexplained departure from *Electric Hose & Rubber* and *Performance Measurements* where union agents were continually present within 20 feet of a building entrance employees had to enter in order to reach the polling place. If the presence of union agents within 20 feet of a building entrance employees had to use to reach the polls "constitute[d] conduct of such a nature that it substantially impaired . . . employees' exercise of free choice," *Nathan Katz Realty*, 251 F.3d at 993, how much more coercive and impairing of free choice would it have been to permit Natale to position himself *in the polling place itself* as a *Board-approved observer*, closely monitoring every single voter mere seconds before he or she marked and cast a ballot. Significantly, the court read *Performance Measurements* and *Electric Hose & Rubber* "to stand for the proposition

[3] Sec. 9(a).

[4] Stipulation ¶ 10 (emphasis added).

[5] Casehandling Manual (Part Two), Representation Proceedings, Sec. 11310.2 (citing *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993); *Kelley & Hueber*, 309 NLRB 578 (1992); *Bosart Co.*, 314 NLRB 245 (1994)) (emphasis added). My colleagues acknowledge this language by stating that it "merely expresses the normative principle—with which [they] do not necessarily disagree—that" a nonemployee union official's performance of the role of observer "is disfavored." But there is a *reason* why this is disfavored. The presence of a party's agent within the polling place is coercive, regardless whether the individual is the employer's agent or the union's agent. However, my colleagues reject this proposition. They believe that the presence of a union agent is not coercive. Thus, despite their protestation to the contrary, it seems that they *do* disagree with the Casehandling Manual.

that *a party*"—not just an *employer* party—"engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty*, 251 F.3d at 993 (emphasis added). I read those cases the same way, and no one is more "continually present in a place where employees have to pass in order to vote" than an election observer.

My colleagues cite several court cases in which elections were upheld notwithstanding the presence of union officials as observers. However, all of those cases predate *Nathan Katz Realty*, and there is no indication in any of them that a party argued, or the court considered, the inconsistency between *Performance Measurements* and *Electric Hose and Rubber*, on the one hand, and permitting union agents to serve as election observers on the other.

My colleagues believe there is no inconsistency. Their position is that there *should* be a different rule for employer agents and union agents. In their view, the former should be prohibited from serving as election observers and the latter should not because employers wield power over employees and unions do not. At one time, the Board relied on the same rationale to justify disparate standards for employer photographing of employees engaged in Section 7 activity (objectionable) and union photographing of employees engaged in Section 7 activity (unobjectionable). See *Randell Warehouse of Arizona*, 328 NLRB 1034, 1037 (1999) (*Randell I*) (justifying disparate standards on the basis that "an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment"). But the Board subsequently overruled *Randell I* and rejected this reasoning. See *Randell Warehouse of Arizona*, *Inc.*, 347 NLRB 591 (2006) (*Randell II*). In *Randell II*, the Board pointed out that "unions also have ample means available to them to punish employees":

> Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them. . . . The opportunities for and means of reprisal available to unions may differ from those available to employers, but they are no less real or intimidating.

*Randell II*, 347 NLRB at 594–595. In my view, the rationale my colleagues rely on to apply different standards to employer-agent observers and union-agent observers does not survive *Randell II*.[6]

It is also true that election observers play an important role in our elections by potentially "challenging voters and generally monitoring the election process." *NLRB v. Frontier Hotel*, 625 F.2d 293, 295 (9th Cir. 1980). And it is unfortunate that the Union's arrangements for an appropriate observer proved to be inadequate. But I do not believe, in these circumstances, that the Board agent should have permitted Natale to serve as the Union's observer. The Board agent was faced with a choice between either (i) permitting a high-ranking, nonemployee official of one of the parties to serve as an election observer, or (ii) adhering to the eligibility criteria that have long governed election observers and were well known to the parties given that their Stipulation provided for "*nonsupervisory-employee observers*" (emphasis added).[7] Those were the only options, and in my view, the numerical imbalance in observers was not caused by the Board agent's actions but rather resulted from the Union's failure to make adequate arrangements (such as having alternatives if the designated employee-observer was unavailable). Additionally, regardless of the cause, the numerical imbalance in observers is far less consequential than the coercive effect of having an imbalance that would have gone the other way, where the Employer's observer would have been a nonsupervisory employee (consistent with the parties' Stipulation) and the Union's observer would have been its East Coast Regional Director, which would have been contrary to the parties' Stipulation *and* to the Board's longstanding standards regarding observers.

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[6] In support of applying different standards to employer-agent observers and union-agent observers, my colleagues note that the Board applies different standards to employers and unions when it comes to home visits and preelection polling. But home visits and polling are fundamentally different from stationing a party's agent at the threshold of the voting booth. As the Board explained in *Randell II*, "[d]irect personal solicitation and polling are the primary means by which unions effectuate the policies of the Act by affording employees the right to 'self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.'" 347 NLRB at 595. In other words, home visits and polling, which "provide natural occasions for bilateral discussion and noncoercive attempts to persuade," id., are organizational tools. The Board in *Randell II* distinguished such activities from photographing employees, which "does not play the same central role in employee self-organization." Id. at 596. Using party agents as election observers is even more distinguishable from organizational activities such as home visits and polling: by the time employees are about to mark and cast their ballots, all organizing has ended, and the Board's concern shifts to ensuring that "[t]he final minutes before an employee casts his vote should be . . . as free from interference as possible." *Milchem, Inc.*, 170 NLRB 362 (1968).

[7] Stipulation ¶ 10.

Nor do I believe it is appropriate to set aside the election because the Board agent did not handle the present situation in the manner prescribed in *Browning-Ferris Industries of California*, supra. There, the Board majority, over Member Hurtgen's dissent, criticized a Board agent for not allowing the petitioner to use as observers two former employees of the employer. The majority concluded that when the Board agent was informed by the petitioner of its desire to use two nonemployees as observers, he should have advised the parties of the potential adverse consequences of using nonemployees as observers under applicable caselaw, but allowed the election to proceed with the observers chosen by the parties, leaving to the objections process the resolution of any issues that might be raised as to the reasonableness of the petitioner's actions. The majority further explained that the unequal numbers of observers that resulted from the Board agent's action amounted to a material breach of the stipulated election agreement provision requiring an equal number of observers. The majority observed that

> [w]hen one party has observers and the other does not, or there is an imbalance in the number of observers, there is a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of one party and partiality on the part of the Board. In contrast, there is nothing inherent in the fact that a party's observer is not an employee of the employer that would tend to call into question the integrity of the election process.

327 NLRB at 704 (internal quotations, citations, and alterations omitted).

The considerations at issue in the instant case are materially different from those addressed in *Browning-Ferris Industries*. Here, my colleagues find that the Board agent should have permitted a high-ranking union official to preside over the election, when the Employer's observer (consistent with the parties' Stipulation and longstanding Board procedures) would have been a rank-and-file nonsupervisory employee. This type of imbalance, and the resulting arrangement under which all employees would have cast their votes in the presence of a union official, would have done more than merely "call into question the integrity of the election process." *Browning-Ferris Industries*, 327 NLRB at 704. It would have destroyed it. See *Nathan Katz Realty*, 251 F.3d at 993. Here, unlike in *Browning-Ferris Industries*, the Union, upon learning that its designated observer would be unavailable, did not merely seek to use a nonemployee as an observer. It sought to use its own high-level official *who was personally responsible for the Union's organizing activities*. The Board agent properly concluded this would obviously imperil the validity of the election. In my view, nobody can credibly argue—even now, with the benefit of hindsight—that it would have been "reasonable under the circumstances"[8] to permit the East Coast Regional Director to position himself as the Union's observer inside the polling place itself.

At bottom, the Union, through no fault of the Employer, ended up without an observer. But that numerical imbalance should not obscure the fact that had Natale been allowed to serve as an observer, the number of observers would have been equal, but the status of the observers (on one side, a union official; on the other, a nonagent employee) would have been strikingly unequal. Moreover, the resulting arrangement plainly would have resulted in an invalid election under *Nathan Katz Realty*, supra. Again, the Stipulation stated that each party "may station an equal number of nonsupervisory-employee observers at the polling places . . . ." The Union was given the opportunity to do so. Its failure to do so was not the Employer's fault. See *Browning-Ferris Industries*, supra at 705 (Member Hurtgen, dissenting).[9]

In conclusion, I believe that the Board agent reasonably determined that Natale was not entitled to serve as an observer and that her action furthered the goal of ensuring a free and fair election. Therefore, I respectfully dissent.

Dated, Washington, D.C. July 19, 2016

Philip A. Miscimarra, Member

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[8] Casehandling Manual (Part Two), Representation Proceedings, Sec. 11310.2.

[9] I also do not find the hearing officer's reliance on Casehandling Manual (Part Two), Representation Proceedings, Section 11310 to be persuasive. At best, the language (which is nonbinding in any event) is conflicting. Citing *Browning-Ferris Industries*, the Casehandling Manual states, among other things, that the Board agent should not attempt to determine the eligibility of an observer and that unresolved issues should be left to the objections process. The Casehandling Manual also emphasizes, however, that nonemployee union officials should not serve as observers. As I discuss in the text, *Browning-Ferris Industries* did not involve a high-ranking union official who wanted to serve as an observer. It involved using nonemployees as observers and the balance to be struck where permitting such individuals to do so would have enabled the parties to achieve numerical balance without inherently calling into question the integrity of the election. Here, achieving numerical balance by permitting Natale to serve as the Union's observer would have destroyed the integrity of the election.